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IN THE

Supreme Court of the United States.

WILLIAM M. BARRETT, as President of the Adams Express Company,

Petitioner,

—against—

ARTHUR H. VAN PELT,

Respondent.

PETITIONER'S BRIEF.

Statement.

This is an appeal by writ of certiorari from a judgment of the Appellate Division of the Supreme Court of the State of New York, affirming a judgment of the Supreme Court of New York entered in favor of the plaintiff and against the defendant for the sum of $3,345.65.

The action was brought to recover damages for loss due to decline in market value because of alleged delay in the transportation of a shipment of eggs delivered to defendant for transportation from Louisville, Kentucky, to New York City on February 23, 1918. There was no evidence whatsoever of any physical damage to the shipment by reason of the delay or any other cause. The plaintiff *did not allege in his complaint or offer on the trial any proof of negligence on the part of the defendant except the alleged failure to deliver within a reasonable time.* It is admitted that no

claim for damages was filed until October 4, 1918, seven months after the shipment was delivered (Def. Ex. I).

No evidence was introduced on behalf of the defendant except testimony to show a difference between a so-called "tracer" and a claim (Record, pp. 75-79).

The principal defense was that plaintiff had not filed a claim in writing within four months from the delivery of the shipment, as required by the provisions of the Uniform Express Receipt, under which the shipment was transported. This defense was not affirmatively pleaded in the answer, and the trial Judge held that by failing to plead this defense affirmatively the defendant had waived it and lost the right to avail itself of it (Record, p. 85).

On the appeal to the Appellate Division, that court held that if the provisions of the Uniform Express Receipt required the plaintiff to file a written claim within any specified time they were void under the provisions of the Act to Regulate Interstate Commerce, and subsequent amendments thereto, particulahly that of March 4, 1915, known as the First Cummins Amendment (Record, p. 87).

Specification of Errors.

It is submitted that the said Appellate Division of the Supreme Court of the State of New York for the First Department erred in entering the aforesaid judgment in the following particulars:

1. The Court erred in holding that the so-called First Cummins Amendment to Section 20 of the

Interstate Commerce Act (38 Statutes, 1196-1197, Chap. 176, amending 24 Stat. 386, Section 20, as amended by 34 Stat. 593, 595, Section 7), prohibited the petitioner from requiring the filing of claims within four months after the delivery of shipments when such claims were for monetary damages growing out of delay in transportation resulting solely in a decline in market value and not in physical damage to the shipment.

2. The Court erred in failing to hold that the respondent had failed to bring himself within the application of the First Cummins Amendment hereinabove referred to by failing to affirmatively plead and prove that the delay complained of was due to the negligence and carelessness of the appellant.

3. The Court erred in failing to hold that the appellant could not waive the requirements of the Uniform Express Receipt as conditions precedent to recovery, and that the appellant's failure to plead affirmatively such provisions in its answer did not deprive it of the right to avail itself of such defense on the trial.

Petitioner's Points.

The petitioner's contentions on this appeal are as follows:

(1) The provisions of the Uniform Express Receipt required the plaintiff to file a claim within four months from the time of delivery as a condition precedent to recovery and these conditions

of the receipt were valid and enforcible under the Interstate Commerce Act and the various amendments thereto.

(2) Even if the Interstate Commerce Act prohibited, under certain circumstances, the requirement that claims for loss of market value due to delay in transportation should be filed within a specified time, such prohibition is in the form of an exception, which is limited to cases where the delay is a negligent one and such negligence must be affirmatively pleaded and proved by the claimant.

(3) The defendant could not waive the requirements lawfully inserted in the Uniform Express Receipt as conditions precedent to recovery and its failure to plead affirmatively such provisions in its answer did not deprive it of the right to avail itself of such defense.

POINT I.

The provisions of the Uniform Express Receipt required the plaintiff to file a claim in writing within four months from the time of delivery as a condition precedent to recovery, and these conditions were valid and enforcible under the Interstate Commerce Act and the various amendments thereto.

(a) *Stipulations inserted in a carrier's receipt reasonably limiting the time for filing of claims were valid at common law and have been uniformly upheld by this Court.*

The carrier's right to require the filing of written notice of claim within a reasonable time as a condition precedent to recovery for loss, damage or delay, has been established by a long line of decisions in this Court. Such stipulations contravene no public policy. They are held to effectuate a salutary purpose. They work no hardship on the shipper and are of great assistance to the carrier in facilitating the early investigation of claims. This Court uniformly has upheld such stipulations as both reasonable and valid.

Express Co. v. *Caldwell*, 88 U. S. 264;
M. K. & T. Ry. Co. v. *Harriman Bros.*, 227 U. S. 657;
G. F. & A. Ry. Co. v. *Blish Milling Co.*, 241 U. S. 190;
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Erie R. Co. v. *Stuart*, 250 U. S. 465;
T. & P. Ry. Co. v. *Leatherwood*, 250 U. S. 478.

In *Georgia F. & A. Ry. Co.* v. *Blish Milling Co.*, *supra*, a stipulation requiring the filing claims for loss, damage or delay in writing within four months was held a reasonable stipulation. In that case the shipment was delivered to the wrong consignee but the Court held that such notice in writing of claim may be reasonably required by a carrier even in cases where the loss or damage was caused

by the carrier's own negligence. The Court in deciding this question said:

> "It may be urged that the carrier is bound to know whether it has delivered to the right person or according to instructions. This argument, however, even with respect to the particular carrier which makes a mis-delivery, loses sight of the practical object in view. In fact, the transactions of a railroad company are multitudinous and are carried on through numerous employees of various grades. Ordinarily the managing officers, and those responsible for the settlement and contest of claims, would be without actual knowledge of the facts of a particular transaction. The purpose of the stipulation is not to escape liability but to facilitate prompt investigation. And, to this end, it is a precaution of obvious wisdom, and in no respect repugnant to public policy, that the carrier by its contracts should require reasonable notice of all claims against it even with respect to its own operations."

It should be noted that the decisions above cited are not based upon any statutory permission, but represent the common law as declared by the decisions of this Court and as such are binding on all the Courts of this country in so far as they laid down the law with reference to interstate commerce (*Adams Express Company* v. *Croninger*, 226 U. S. 491).

(b) *The proviso in the First Cummins Amendment, being an exception and in derogation of the common law, must be strictly construed.*

In March, 1915, Congress passed Chapter 176,

Act of Congress, March 4, 1915, otherwise known as the First Cummins Amendment to Section 20 of the Interstate Commerce Act, the portion material in this case reading as follows:

> "Provided further, that it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*" (Italics ours.)

This Statute is in derogation of the common law as previously declared by this Court, and must be strictly construed. *Lewis' Sutherland Statutory Construction*, 2nd Ed., Vol. 2, Sec. 454, p. 862.

Moreover, this provision must be strictly construed because it is an exception.

> "The enacting clause is, of course, the principal part of the statute, and, as its terms may be presumed to have embodied the main body of the Act, the proviso should be strictly construed."

See

36 Cyc. 1162;

U. S. v. *Dickson*, 15 Peters, 141, 163;

Georgia Banking Co. v. *Smith*, 128 U. S. 174, 181;
Interstate Commerce Comm. v. *Baird*, 194 U. S. 25, 36, 37;
American Express Co. v. *U. S.*, 212 U. S. 522, 534.

The present proviso may well be termed an exception of exceptions, since it is an exception to the more general provisos in the Act providing reasonable minimum limits beyond which the carriers may not go in requiring the filing of claims and the institution of suits, and it would seem to follow that such a proviso should be more strictly construed than the ordinary proviso to a general provision.

(c) *The grammatical construction of the proviso and the plain meaning of the words used clearly indicate an intention that the word "delay" in this exception was meant to be read in connection with the words "while being loaded or unloaded."*

The effect of the proviso in the First Cummins Amendment and in the Uniform Express Receipt drawn in conformity therewith, is plain when construed as written and punctuated. For the purposes of charity and ready reference, we restate them separately in two columns, (a) being the proviso in the Statute, and (b) the provision in the Uniform Express Receipt:

(a)	(b)
"Provided f u r t h e r, that it shall be unlawful for any such com-	"except where the loss, damage or injury complained of is due to

mon carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however, that if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.*" (Italics ours.)

delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, as conditions precedent to recovery claims must be made in writing to the originating or delivering carrier within four months after delivery of the property or, in case of failure to make delivery, then within four months after a reasonable time for delivery has elapsed; * * *"

The punctuation clearly indicates that there were two general classes of claims which should be excepted from the general permission granted to carriers to insert stipulations in their bills of lading requiring the filing of claims and institution of suit. These classes are—First, claims for delay or damage in loading or unloading, and, Second, claims for damage in transit by carelessness or negligence. If the word "delay" has no relation to the phrase "while being loaded or unloaded," it is obvious that there was no reason for inserting a comma after the word "unloaded." If there had been no comma inserted after the word "unloaded," or if there had been commas

after both "delay" and "unloaded," it would seem reasonable to assume that the draftsman of the bill intended that there should be three general classes of exceptions. The fact that he used a comma in one place and did not use it in another would indicate that he had the definite purpose of marking off two general classes of claim, *i. e.*, (1) delay or damage while being loaded or unloaded, and, (2) damage in transit.

While it is true that the section is clumsily worded, it cannot be presumed that its draftsman was totally ignorant of the use of every day punctuation. As we shall show in our discussion of the history of the provision, the identical language and punctuation appears in a bill introduced in the House of Representatives and in the amendment introduced in the Senate. Under such circumstances, we submit that it cannot be presumed that the commas were indiscriminately sprinkled into the provision like salt from a shaker without any intent that they should occupy a particular place to serve a particular purpose. The language of the provision is capable of an intelligent interpretation, giving its fullest significance to the punctuation as placed. Such interpretation does no violence to the actual intention of the framers of the provision and is not inconsistent with the previous decisions of this Court with reference to limitations concerning the filing of claims. Under such circumstances the punctuation cannot be disregarded and should be controlling.

(d) *This construction of the proviso is supported by the circumstances surrounding the*

adoption of the First Cummins Amendment and the purpose sought to be accomplished thereby.

The plaintiff's best argument against construing the section as it reads, is the apparently insignificant classification which would be created by an exception referring to claims for "delay * * * while being loaded or unloaded." He can very plausibly urge that so far as the ordinary shipper is concerned, the number of claims in which the damage is caused by delay in loading or unloading is small, and the number of cases where such damage can be proved to have occurred in this manner is even smaller.

However, this argument overlooks the history of this legislation. *This amendment was not put in for the benefit of the ordinary shipper*, it was adopted solely for the benefit of and because of the insistent demands of the livestock shippers of Texas, Missouri, Kansas, Iowa and other cattle-raising states.

The records of the proceedings in Congress and the reports of the Congressional Committees are relevant in ascertaining the intent of Congress in enacting legislation. (*St. Louis & Iron Mountain Ry. Co.* v. *Craft, Admr.*, 237 U. S. 660, 661.) These reports and the discussion before the Committees substantially corroborate the interpretation we place upon this proviso.

The first time the precise language of this provision appears in the record of the proceedings of Congress is in a bill presented by Representative Borland of Missouri on December 14, 1913 (H. R. Bill 10309, 62nd Cong., 2nd Session). This bill was referred to the Committee on Inter-

state Commerce but no further action appears to have been taken on it. It provided as follows:

> "A BILL TO AMEND AN ACT TO REGULATE COMMERCE BY FORBIDDING COMMON CARRIERS FROM LIMITING THE TIME FOR FILING CLAIMS.
>
> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That any common carrier, railroad, or transportation company receiving property for transportation from a point in one state shall issue a receipt or bill of lading therefor and shall be liable to the lawful holder thereof for any loss, damage, or injury to such property caused by it or by any common carrier, railroad, or transportation company to which such property may be delivered or over whose line or lines such property may pass.
>
> It shall be unlawful for any common carrier to provide, by rule, contract, or regulation, a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years: *Provided, however,* That if the loss, damage or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery.
>
> It shall be unlawful for any common carrier, by receipt, rule, contract, or regulation, to exempt itself from the full amount of damage caused by it or by any carrier, railroad or transportation company over which the property may pass, or from the liabilities hereby imposed: *Provided, how-*

ever, That in the enforcement of the liability hereby imposed, the holder of such receipt or bill of lading shall have all the rights and remedies existing under the laws of the state where the suit is instituted."

In referring to this bill in the subsequent debates in the House on the Cummins Amendment, Mr. Borland said that the only purpose of the provision with reference to the limitation time for filing claims was to forbid the carrier to fix an unreasonable time for filing claims (Cong. Rec., Vol. 52, p. 5449). There was nothing in his statement from which it could be inferred that he intended practically to deprive the carriers of the right to require the filing of claims within a reasonable time for all except a few classes of claims.

This provision did not appear in the original text of the Cummins Amendment as first presented to the Senate on February 18, 1914 (S. 4522, 63rd Cong., 2nd Session). That bill referred only to the question of limitations of value. Nor was the provision taken up or discussed at the hearings before the sub-committee of the Senate Committee on Interstate Commerce, At pages 12, 48 and 49 of the Report of the proceedings at the hearings before this sub-committee on March 17, 1914, some reference is made to an amendment apparently proposed, providing that until the Interstate Commerce Commission has affirmatively acted upon the matter, it should be "unlawful to incorporate in any such receipt, bill of lading, contract, rule, regulation, or tariff any limitation respecting the time within which notice of such loss, damage, or injury, shall be given

or suit therefor begun." However, no part of this provision was inserted in the bill with proposed amendments, which was favorably reported to the Senate by the Committee on Interstate Commerce (Report 407, 63rd Cong., 2nd Session). In fact, as so reported, the bill contained no provision whatsoever with reference to requirements for filing claims or commencing suit. Because of the pressure of important legislation pending in the Senate at the time, it was only by the most strenuous efforts that Senator Cummins was able to secure the prompt consideration of his bill after it was reported back by the Committee on Interstate Commerce. The Congressional Record shows that only a certain time was allowed for the discussion of the bill and practically all this time was taken up in the discussion of the provisions prohibiting the limitation of value (Congressional Record, 53rd Cong., 2nd Session, Vol. 51, pp. 9619, 9777, 9783). At the last moment Senator Sheppard of Texas offered an amendment in the form of the provision in question in this suit, which he had apparently taken *in toto* from Representative Borland's bill. There was no discussion of the amendment in the Senate and it was adopted without a roll call. In fact, in referring to the language of this amendment in a subsequent hearing before the House Committee on Interstate Commerce, it was frankly stated that owing to the shortness of the time and the pressure of other legislation, a number of amendments that had been proposed were given away and others accepted in order to get the bill through in the morning hour (Report on Hearings before sub-committee of the House Committee on Interstate and

Foreign Commerce, 63rd Cong., 2nd Session, September 24th, 25th and 30th, 1914, p. 163).

The only reference made by a shipper's representative at the hearings before the House sub-committee with reference to a limitation on the time for filing claims was by a Mr. Farrar. While he complained of the injustice of the existing requirement of some carriers that claims must be filed within 10 days, he expressly admitted that there ought to be a reasonable time limit within which shippers should be compelled to file their claims (Hearings before House sub-committee on "Bills Proposing to Amend the Carmack Amendment," pp. 22, 23).

An examination of the discussion in the proceedings before both the Senate and House sub-committees will indicate at once that the sponsors for the Cummins Amendment were primarily the live stock interests of the country. In fact, the circumstances under which the amendment came to be proposed are frankly set out in the statement of Mr. Sykes, president of the Cornbelt Meat Producers Association of Iowa, before the House Committee at pages 44 and 45 of the Report of Proceedings. Thus, the principal speakers before the House Committee in support of the bill were Mr. Sykes, Mr. J. W. Farrar, representing the Kansas City Live Stock Exchange; Mr. A. F. Striker, representing the South Omaha Live Stock Exchange; Mr. J. H. Henderson, Commerce Counsel for the State of Iowa and Mr. S. H. Cowen, attorney for the American National Live Stock Association. It is significant to note that Mr. W. H. Chandler, representing the Boston Chamber of Commerce, and Mr. J. C. Lincoln,

traffic manager of the Merchants Association of New York City, who also represented the Philadelphia Chamber of Commerce and the National Industrial Traffic League, appeared in opposition to the bill and claimed without any real contradiction that they represented 95 per cent. of the shippers of the country who did not desire the bill adopted in its form at that time. It was clearly a case of live stock growers insisting upon and obtaining a passage of an amendment which was opposed by a great body of shippers. We do not contend that the diversity of opinion between the two bodies had anything to do with the provision in question in this suit. However, it does most significantly indicate the fact that the provision was drafted on behalf of the live stock producers and for their benefit only. The bill was not sponsored by any shipper or organization of shippers except those directly concerned with the live stock business, and as we shall see this fact is highly significant in the interpretation of what would otherwise have been an apparently obscure exception to the general rule laid down by the amendment.

Bearing these facts in mind, let us examine anew the language of this provision in question.

> "*Provided further,* That it shall be unlawful for any common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, and for the filing of claims for a shorter period than four months, and for the institution of suits than two years; *Provided, however,* That if the loss, damage, or injury complained of was due to delay or damage while being

> loaded and unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

It will be seen at once that viewed from the angle of a live-stock shipper, a classification including claims for "delay * * * while being loaded or unloaded," is alive with significance and constitutes a very important class of claims. This was one of the chief grievances which live stock shippers had against the carriers and one of the most fertile sources of claims. The movement of livestock and particularly "feeders" from the corn belts was largely dependent upon market conditions in the great packing centers like Kansas City or Chicago. What the shippers wanted and what the bill intended, was that the railroad companies should be compelled to furnish cars for prompt loading when livestock shipments were tendered and that such shipments should be loaded and unloaded at feeding stops or destination with the utmost dispatch. We submit, therefore, that viewed from the standpoint of the live-stock shippers, the natural grammatical construction of this provision is significant and reasonable. It applies to a class of claims of sufficient importance to make it reasonable to assume that it was desired to make it the subject matter of an exception.

(e) *The Court below decided this case solely on a dictum in a previous case in which the present point was not in any way involved.*

In arriving at its conclusion the Court below set forth no grounds for its ruling except its previous decision in the case of *Bell* v. *N. Y. C. R. R. Co.*, 187 App. Div. 564, in which it said:

> "It will be noted that both the Cummins Amendment and the bill of lading provision make a double classification of claims, to-wit: (I) those for loss due to delay or damage while being loaded or unloaded, or damaged in transit, which we will call transit claims; and those for loss otherwise sustained, which we will call non-transit claims. The Cummins Amendment permitted the carrier to require as a condition precedent to recovery the filing of a non-transit claim within four months, and in such case to require suit to be instituted within two years. In the case of transit claims it forbade the carrier to require the filing of a claim as a condition precedent to recovery but authorized a requirement that suit be instituted within two years."

However, in the *Bell* case the shipment, which consisted of pears, was not only delayed in transit but the car was not properly placed for delivery and several of the containers were broken open and the contents bruised and crushed. It arose on a motion to strike out as insufficient in law the carrier's defense that suit was not commenced within two years after delivery. There was no issue in the case either with reference to the filing of claims or the construction of the clause "delay or damage while being loaded or unloaded." The Court's decision of claims into transit and non-transit claims was quite uncalled for by the facts before it for decision and the quotation cited as the bases of the decision in this case was purely *obiter dicta*.

Summary.

It thus appears that the ordinary rules of grammatical construction, the ordinary rules of legal construction applying to the interpretation of exceptions and provisos, and finally the circumstances surrounding the adoption of this amendment all point to the construction of this clause adopted by the defendant. The requirement that claims for delay in transportation should be filed has already been approved by this Court as fair and reasonable. No plausible reason of public policy can be assigned for prohibiting the incorporation of such reasonable requirements in shipping contracts—in fact public policy points the other way.

To construe the exception as prohibiting the carriers from requiring the filing of written claims for delay extends it to a large and important class of claims where fairness requires that the carrier have a reasonable opportunity to investigate. It is true that some courts have, upon a superficial consideration of the question, asserted that the reasons for permitting a carrier to require notice of claims for loss or physical damage did not apply in the case of loss of market value due to delay in transit. Such a statement is apparently based upon the assumption that market values would be as easily ascertainable on a delayed investigation as on a prompt one. However, it overlooks the vital fact that *the delay* which causes a decrease in market value *may have been due to a cause excepted in the transportation contract*, for which the carrier is not chargeable. It is as important from the carrier's

point of view to have prompt information concerning a claim for delay in order that it may seasonably investigate into the causes of the delay as it is to have prompt notice of claims for damage. In each case the carrier may have a defense based as much on the cause of the damage as on its extent.

It may not be amiss to call the Court's attention to the fact that under the Transportation Act of 1920, the provision of the Cummins Amendment involved in this suit was amended to read as follows:

> "Provided further, That it shall be unlawful for any such common carrier to provide by rule, contract, regulation, or otherwise a shorter period for giving notice of claims than ninety days, for the filing of claims than four months, and for the institution of suits than two years, such period for institution of suits to be computed from the day when notice in writing is given by the carrier to the claimant that the carrier has disallowed the claim or any part or parts thereof specified in the notice" (41 Stat. L. 494).
>
> "Provided, however, That if the loss, damage, or injury complained of was due to delay or damage while being loaded or unloaded, or damaged in transit by carelessness or negligence, then no notice of claim nor filing of claim shall be required as a condition precedent to recovery."

We believe that the spirit of this amendment and the purpose which it sought to accomplish was fair and just. However, it is apparent that where the carrier cannot require the filing of

the claim for damages, the claimant's time to bring suit will be indefinitely extended until such time as he chooses to present his claim and have it acted upon by the carrier. This will subject the carrier to the harassment of suits brought long after its records have been destroyed and its employees' recollections of the individual transaction have been forgotten. We do not believe the Court should adopt a construction of this proviso of the Cummins Amendment which cannot be reasonably justified in its immediate application and is so unjust in its consequential application unless the intention Congress unmistakably appears to have been t. nclude in the proviso the broad classification of claims for mere delay in transit.

POINT II.

Even if the Interstate Commerce Act does not permit a carrier to require the filing of a claim for delay in transit due to carelessness or negligence, this exception only applies where the carriers' negligence is both pleaded and proved.

If the punctuation be entirely disregarded, as demanded by the plaintiff, and if it be held that there are three classes of exceptions to the general rule permitting a requirement for the filing of claims; *i. e.*, (1) delay, (2) damage while being loaded or unloaded, and (3) damage in transit, it is submitted that the exception within which the plaintiff must bring his case is one of delay due to the carelessness or negligence of the carrier.

Such is the position taken by the Federal District Court for the Southern District of Idaho, *Hailey* v. *Oregon Short Line*, 253 Fed. 569, the Circuit Court of Appeals for the First Circuit, *Gillette Safety Razor Co.* v. *Davis*, 278 Fed. 864, and an intermediate appellate court of Illinois, *Conover* v. *Wabash R. R. Co.*, 208 Ill. App. 105. Neither of the cases in the Federal Court actually involved the construction of the phrase "delay or damage while being loaded or unloaded," but in construing the succeeding clause of the Act they held by way of dictum that the phrase "carelessness or negligence" referred to all the exceptions in this proviso.

Thus in the *Hailey* case, Federal District Judge Dietrich said:

> "So far as the facts in this case are concerned, the construction involves no lexical or grammatical difficulties. *The damages claimed were not the result of delay or injury in loading or unloading the horses; they were damaged 'in transit,'* as that phrase is ordinarily understood, and by the carelessness and negligence of the carrier, if the averments of the complaint are true. The phrase 'carelessness and negligence' undoubtedly qualifies 'damaged in transit.'
>
> In the case of a claim for damages *suffered in the loading or unloading of a shipment*, the grammatical relation of the phrase, especially when we consider the punctuation, is more difficult. But in some particulars the grammatical construction is manifestly defective, and that being true, it may very well be that the use of a comma is the result of inadvertence rather than of design. If in other respects the structure were artistic perhaps a different view

> should be taken; but under the circumstances it is thought we are warranted in entirely ignoring the comma after 'unloaded' or inserting it after 'transit'. In this view the provision in effect relieves the shipper from giving notice or filing claim for such damages, and such damages only, as result from the carrier's negligence, either in loading the shipment at the point of origin, or in carrying it to the point of destination, or in their unloading it. A claimant must either allege and prove notice, and the filing of a claim, or must allege and prove negligence. Here the plaintiffs have alleged negligence, but neither the giving of notice nor the filing of a claim, and to succeed it will therefore be incumbent upon them to prove negligence." (Italics ours.)

In the *Gillette Safety Razor Comapny* case, the damage consisted of the total loss of the shipment, but the Circuit Court of Appeals for the First Circuit said:

> "Thus read it is clear that Congress intended by the language of the act that the carrier should be responsible for loss occasioned the consignee by the carrier's negligent delay, negligence in loading or unloading, and negligence in transit. In other words, the liability imposed, where the required notice is not given, is for negligence, and as to these matters it differs in no material respect from the liability of a warehouseman, who is liable for negligence only. *Southern Railway Co.* v. *Prescott*, 240 U. S. 632, 640, 36 Sup. Ct. 469, 60 L. Ed. 836."

It seems clear that if the word "delay" relates to the words "negligence or carelessness," the

burden is on the claimant to prove the facts which take his case out of the general rule requiring the filing of claims in writing. There is abundant authority for the proposition that where a claimant relies upon a particular fact to take his case out of the operation of a general limitation in favor of the carrier, the burden of proving this fact is on him.

Schlemmer v. *B. R. & P. Ry.*, 205 U. S. 110;
Javierre v. *Central Altagracia*, 217 U. S. 502, 507, 508;
Cochran v. *Dinsmore*, 49 N. Y. 249;
Platt v. *Richmond, etc., R. R.*, 108 N. Y. 358;
Whitworth v. *Erie*, 87 N. Y. 413.

The respondent contends that even if this is so, the mere proof of an unreasonable delay creates a presumption of negligence which brings his case within the exception contained in the Act and relieves him of the necessity of proving the filing of a written claim. If the exception did not contain the words "by carelessness or negligence," the respondent's contention would be permissible as he would have complied with the requirement of the law that he affirmatively allege and prove the fact which brings his case within the exception of which he is seeking to take advantage by merely proving that his claim was one for delay. However, the insertion of the words "by carelessness or negligence" limited the exception by more specifically describing the claims in which the plaintiff did not have to file a written claim. The addition of these words

requires the plaintiff not only to prove that his claim was one for delay but that it is one for delay due to negligence or carelessness of the carrier. In determining whether or not the plaintiff has made out a case within the language of the *exception* contained in the Cummins Amendment, we must be guided by an entirely different measure of proof than that required to make out a simple cause of action on the claim. It may be true that if it were not for the provision in the express receipt requiring the filing of a written claim plaintiff's case would be complete upon the mere proof of unreasonable delay. However, when he seeks to avoid the requirement for the filing of a written claim he must go further and prove a *negligent delay.* As to the mere question of liability the plaintiff can claim the benefit of the presumption of negligence arising from the mere fact of delay but this presumption does not apply to the proof necessary to dispense with the filing of a claim as a condition precedent to recovery. The whole question is one of the burden of proof and it may well be that this is a possible explanation for the apparent discrepancy between claims where no notice of claim need be filed and those where it is required.

We do not contend that Congress necessarily had in mind the close legal question as to where the burden of proof would lie but we do contend that it actually had in mind the result which was brought about by the application of the usual legal rules of interpretation. What we think the framers of this exception had in mind was this: a carrier is practically an insurer of the merchandise delivered to it for carriage; as such it is

entitled to prompt notice of loss or damage in order to make a seasonable investigation; however, no carrier can be permitted to relieve itself from liability for its own negligence, by a requirement that claims must be filed within a certain time as a condition precedent to recovery. We believe that Congress may well have had the intention of differentiating between cases of insurance liability of the carrier where negligence is only imputed from the fact of damage or delay and liability based on actual proof of the carrier's negligence; that in the former case they intended to allow the carrier to impose certain technical requirements of notice whereas in the latter case they intended that no contract provision could bar a recovery.

In the present case the complaint is barren of any allegation of negligence on the part of the defendant and the plaintiff made no attempt at the trial to prove any negligence on the part of the defendant, his evidence being confined to proof of the most sketchy character that there had been an unreasonable delay in delivery of the shipment.

POINT III.

The defendant could not waive requirements lawfully inserted, in the uniform express receipt as conditions precedent to recovery, and its failure to affirmatively plead such provisions in its answer did not deprive it of the right to avail itself of such defense.

While the Appellate Division of the New York Supreme Court did not mention as a ground for

its decision the alleged waiver by the defendant of its right to avail itself of the plaintiff's failure to file a claim within four months from the time of delivery, this was the ground upon which the trial justice denied the defendant's motion to dismiss the complaint, and we feel that it should be answered. So far as we know there has been no decision of this Court squarely on the point, although the highest courts of several states have already held that the carrier could not waive the defense of the failure to file claim by negotiations with the claimant or by failure to properly plead such defense.

The theory upon which we base our contention is that the Interstate Commerce Act has created a special field of substantive law with reference to the conduct of carriers and shippers engaged in interstate commerce. This Court has repeatedly held that one of the fundamental purposes for which the Interstate Commerce Act was passed was to prevent the possibility of discrimination between shippers, and this principle has been rigidly enforced, although in some cases its application may have worked hardship and injustice to the particular shipper.

Pittsburgh, etc., Ry. Co. v. *Fink,* 250 U. S. 577;
Titus v. *Penna R. R.,* 216 N. Y. 17.

As we understand the law, every shipper is bound by the knowledge of the entire contents of the public filed classifications and tariffs, and it is illegal for the shipper and carrier by agreement, either at the time of shipment, to vary in any way from the service and rates prescribed

in such tariffs, or by conduct in connection with the handling of claims arising out of such shipments, to allow one shipper to evade the requirements of the tariffs with reference to the filing of claims or bringing suit. For this reason we say that all the old rules of the common law with reference to waiver and estoppel by carriers by continuing negotiations for the settlement of a claim or the failure to plead such a defense affirmatively when sued, cannot affect its right and duty to set up such defense. It is apparent at once that if a carrier can by its conduct waive the requirements for the filing of written claim, the door will be opened for discrimination of the grossest kind. Discrimination in favor of a particular shipper would be as real if there had been an actual rebate, while the manner of the commission of the offense would be such as would make it practically impossible to prove an intent to evade the Act. Under the circumstances, we submit that no matter what may have been the procedural requirements of the State of New York with respect to the pleadings of affirmative defenses, the defendant could not estop itself from urging on the trial every defense which it had to the plaintiff's claim under its published and filed classifications and tariffs. To hold the contrary would be to open the door at once to rebates and discrimination, and would nullify a long line of decisions of this Court prohibiting such practices.

It must be remembered that in the present case both the Cummins Amendment and the Uniform Express Receipt specifically made the filing of a claim "a condition precedent to recovery."

This Court said, in the case of *Georgia, etc. Railway* v. *Blish Milling Co.*, 241 U. S. 190:

> "It is urged, however, that the carrier in making the misdelivery converted the flour and thus abandoned the contract. But the parties could not waive the terms of the contract under which the shipment was made pursuant to the Federal Act; nor could the carrier by its conduct give the shipper the right to ignore these terms which were applicable to that conduct and hold the carrier to a different responsibility from that fixed by the agreement made under the published tariffs and regulations. A different view would antagonize the plain policy of the Act and open the door to the very abuses at which the Act was aimed. *Chi. & Alt. R. R.* v. *Kirby*, 225 U. S. 153, 166; *Kansas Southern Ry.* v. *Carl, supra; A. T. & S. F. Ry.* v. *Robinson*, 233 U. S. 173, 181; *Southern Ry.* v. *Prescott, supra.*"

So also this Court said in the case of *Texas & Pacific Rwy. Co.* v. *Leatherwood*, 250 U. S. 478, at page 481:

> "Leatherwood contends that the principle upon which the case was decided is not applicable here, because there the carriers sought to avail themselves of the second bill of lading, while here they seek to ignore it; and he insists that the carriers are, by their conduct, estopped from asserting its invalidity. As stated in *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197, the parties to a bill of lading cannot waive its terms, nor can the carrier by its conduct give the shipper a right to ignore them. 'A different view would antagonize the plain policy of the

> Act and open the door to the very abuses at which the Act was aimed.' The bill of lading given by the initial carrier embodies the contract for transportation from point of origin to destination; and its terms in respect to conditions of liability are binding upon the shipper and upon all connecting carriers, just as a rate properly filed by the initial carrier is binding upon them. Each has in effect the force of a statute, of which all affected must take notice. That a carrier cannot be prevented by estoppel or otherwise from taking advantage of the lawful rate properly filed under the Interstate Commerce Act is well settled.
>
> A carrier has, for instance, been permitted to collect the legal rate, although it had quoted a lower rate and the shipper was ignorant of the fact that it was not the legal rate."

In *Davis* v. *Henderson*, 44 October Term, 1924, Mr. Justice Brandeis, on October 27, 1924, said:

> "there is no claim that the rule requiring written notice was void. The contention is that the rule was waived. It could not be. The transportation service to be performed was that of common carrier under published tariffs. The rule was a part of the tariff. *Georgia, Florida & Alabama Ry. Co.* v. *Blish Milling Co.*, 241 U. S. 190, 197; *Missouri, Kansas & Texas Ry. Co.* v. *Ward*, 244 U. S. 383, 388; *Davis* v. *Cornwell*, 264 U. S. 560, 562."

In *Southern Railway* v. *Prescott*, 240 U. S. 632, it was held that the Federal rule as to the burden of proof would prevail although it might be contrary to state law. The law of the United States cannot be evaded by the forms of local practice.

Rogers v. *Alabama*, 192 U. S. 226; *American Railway Express* v. *Levee*, 263 U. S. 19.

In the following cases the Federal Courts have held that the giving of the notice of claim is a condition precedent to the right of the shipper to maintain an action and must be alleged in his complaint.

Metropolitan Trust Co. v. *T. St. L. & K. C. R. R.*, 107 Fed. 628;
The Westminster, 127 Fed. 680;
Clegg v. *St. L. & San Francisco R. R.*, 203 Fed. 971.

The highest courts of the following states have specifically held that the carrier could not waive its duty to take advantage of the claimant's failure to file a claim within the period prescribed in the bill of lading.

Bronstein v. *Payne*, 113 Atl. 648 (Maryland);
Hennington Produce Co. v. *American Ry. Ex. Co.*, 188 N. W. 272 (Minnesota);
Metsco v. *NB. & M. R. R.*, 116 N. E. 475 (Massachusetts);
Nashville V. & St. L. Ry. v. *Kamper*, 78 So. 925 (Alabama);
Harelson v. *St. L. & S. F. R. R.*, 191 S. W. 1068 (Missouri);
Olivit Bros. v. *Pennsylvania R. R.*, 96 Atl. 582 (New Jersey);
Houston, etc., Ry. v. *Houston Packing Co.*, 203 S. W. 1140 (Texas);
Stevens-Scott R. Co. v. *C. R. I. & P. Ry. Co.*, 221 Pac. 1116 (Kansas).

POINT IV.

The judgment of the Appellate Division of the Supreme Court of the State of New York should be reversed and judgment should be entered in favor of the defendant, dismissing the complaint with costs.

Respectfully submitted,

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